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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1407

CARL PERLA, SR.,

*Petitioner.*

v.

STATE OF NEW YORK and
LOUIS J. LEFKOWITZ, as Attorney General
of the State of New York

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HERALD PRICE FAHRINGER
One Niagara Square
Buffalo, New York 14202

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

*Counsel for Petitioner*

May 6, 1968

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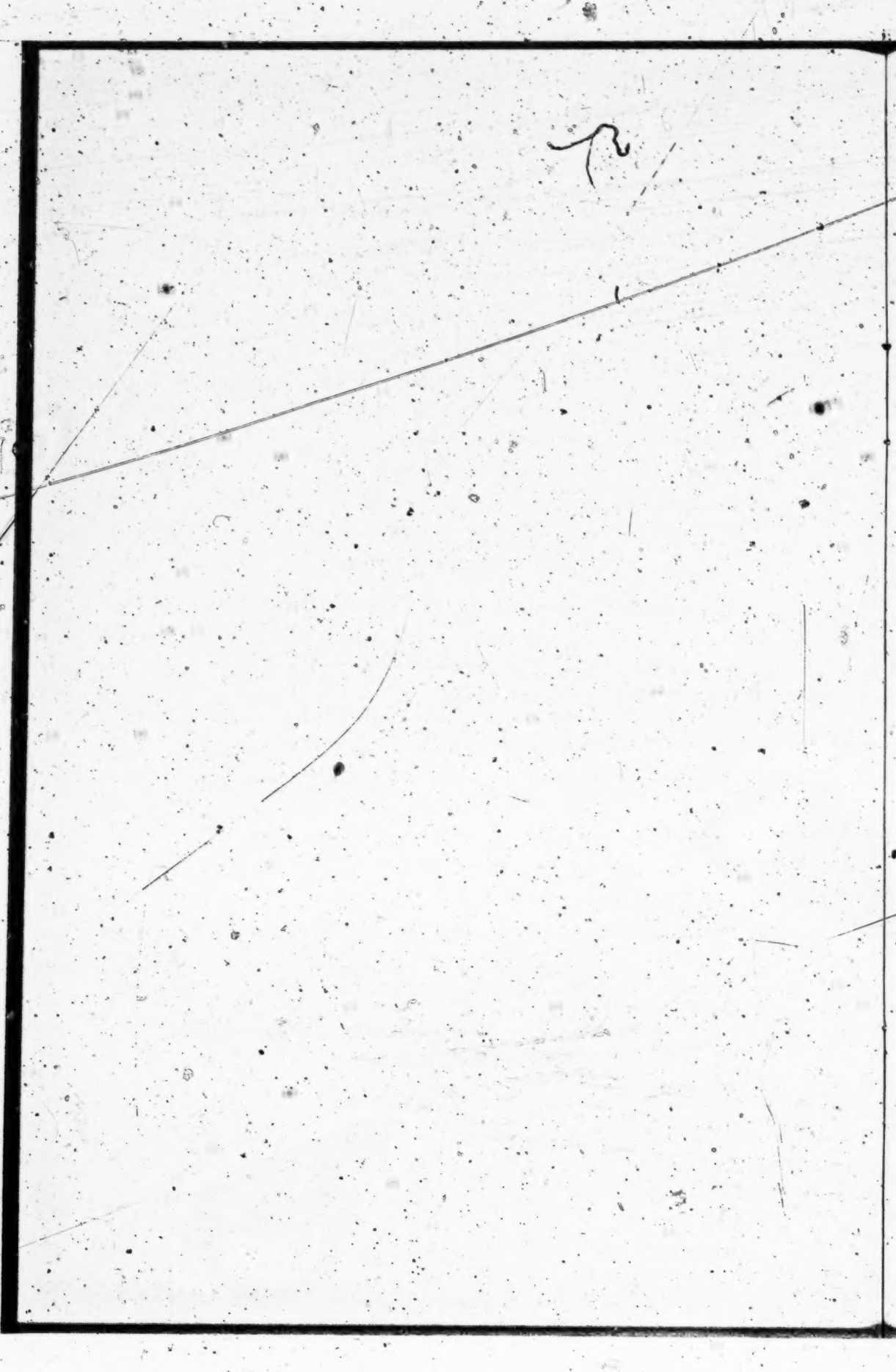

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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The petitioner, CARL PERLA, SR., prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the State of New York rendered in these proceedings on April 23, 1968.

## OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, pp. 12-20. The opinion of the Supreme Court of Erie County, is unreported, and appears at Appendix B,,*infra*, pp. 21-26. The Appellate Division

affirmed the judgment of the Supreme Court of Erie County without opinion.

## JURISDICTION

The order or judgment of the Court of Appeals of the State of New York was entered on April 23rd, 1968. See Appendix A, p. 19, *infra*. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

The Attorney General of New York brought suit under Art. I, Sec. 6, of the New York Constitution to declare the forfeiture of and disqualification for public office due to the incumbent's refusal to sign a waiver of immunity in a grand jury inquiry. The questions thereby arising are:

1. Whether the action of the New York Court of Appeals in (a) reversing the lower court judgments holding the public employee involved not to be within the scope of Art. I, Sec. 6, and (b) directing the entry of a summary judgment ordering the forfeiture of the employee's office and disqualifying him for public office for five years, without further hearing of any kind; is consistent with the Due Process Clause of the Fourteenth Amendment.

2. Whether Art. I, Sec. 6, of the New York Constitution, as construed and applied so as to disqualify, without a hearing of any kind, a public employee from holding his present office or any other public office for five years, solely because the employee refused to sign a waiver of immunity, is invalid under the Fifth Amendment of the United States Constitution in that it punishes the employee for having asserted his privilege against self-incrimination.

## CONSTITUTIONAL PROVISIONS INVOLVED

*Constitution of the United States, Amendment V:*

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

*Constitution of the United States, Amendment XIV, § 1:*

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . ."

*Article I, Section 6, New York State Constitution:*

> "No person shall be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general."

## STATEMENT OF FACTS

The facts relevant to the question presented by this petition are uncontroverted and therefore may be introduced to the Court in a summary fashion.

The petitioner, CARL PERLA, SR., is the Commissioner of Street Sanitation of the City of Buffalo, New York. Previously he had been a Parking Fee Collector for the City of Buffalo through the years 1954 through 1965. This case has its origin in a grand jury investigation commenced by the Erie County District Attorney's office in March of 1966 concerning the collection of parking fees in the City of Buffalo.

### *The Grand Jury Investigation*

On March 15, 1966, the petitioner, CARL PERLA, SR., as a former Parking Fee Collector, was subpoenaed to appear before the Grand Jury of Erie County and was asked by the District Attorney to sign a waiver of immunity under the authority of Article I, Section 6, of the New York State Constitution, which provided in part:

> ". . . the performance of my official duties as Parking Fee Collector and Acting Head Parking Fee Collector and charges of Conspiracy, Section 580 P.L., Bribery, Section 378 P.L., Section 1822 and 1823 of the Penal Law, in taking of unlawful fees and Larceny, Section 1290, 1294 and 1302 of the Penal Law, *and other matters of every nature whatsoever appertaining thereto*. . . ." (R. p. 24, Emphasis supplied).[1]

The petitioner never was asked and therefore never refused to testify about any subject under investigation. But acting on advice of counsel, he declined to sign a waiver of immunity on the grounds that he was not a "public officer" and

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[1] References are to the pages of the printed record before the Court of Appeals, certified to this Court.

therefore was not required to sign such a waiver, and upon the further ground that Article I, Section 6, violated his privilege against self-incrimination. (R. pp. 49-50). The District Attorney thereafter declined to call the petitioner before the Grand Jury. (R. p. 27)

It is a matter of public record that the Grand Jury continued in official convention and a large number of witnesses were called and testified before that body. The Grand Jury's investigation was concluded on or about the 18th day of October, 1966, and after due consideration of all of the evidence the Grand Jury found that no crimes had been committed and consequently no indictments were returned.

### *The Aftermath of Carl Perla, Sr.'s Refusal To Sign a Waiver of Immunity*

On March 18, 1966, the District Attorney of Erie County sent notices to the Mayor, the Common Council, and the Civil Service Commission of the City of Buffalo and to the Attorney General of the State of New York, advising each of those persons and agencies that the petitioner had declined to sign a waiver of immunity in connection with the Grand Jury's investigation. (R. p. 29)

The Mayor, having secured a legal opinion from his Department of Law, declined to remove the petitioner from office on the ground that a public worker's refusal to sign a waiver of immunity is not, in and of itself, legal grounds for his removal.

The Attorney General of the State of New York, on April 19, 1966, instituted an action under Art. I, Sec. 6, of the New York Constitution "for judgment against the defendant [petitioner herein] that he forfeit and vacate his office as Commissioner of Street Sanitation of City of Buffalo, that he be disqualified from holding any other public office or public employment for a period of five years . . ." R. p. 23. Thereafter, on May 24, 1966, the Attorney General moved for summary judgment to that effect, asserting that there were no issues of fact involved. R. p. 11.

On August 19, 1966, the Supreme Court of Erie County granted the petitioner's counter-motion for summary judgment (see R. p. 35) and dismissed the Attorney General's complaint, finding that the petitioner, as a "public employee" instead of a "public officer," was not obliged to sign a waiver of immunity under Art. I, Sec. 6, of the New York State Constitution. R. pp. 4-11.

The Attorney General appealed to the Appellate Division, Fourth Department, and on June 15th, 1967, the judgment of the Supreme Court was unanimously affirmed without opinion. R. p. 69.

An appeal was then taken by the Attorney General to the New York Court of Appeals and on April 17, 1968, that Court unanimously reversed the judgments below and directed that summary judgment be granted in favor of the Attorney General, requiring the petitioner's forfeiture of his public office and ordering his disqualification from holding future public office or employment for five years.

The New York Court of Appeals interpreted the term "public officer" as including "any one in the public service." The Court of Appeals concluded that Art. I, Sec. 6, of the State Constitution, as applied to this petitioner, was in no was in conflict with the Fifth Amendment of the Federal Constitution.

In substance, the petitioner's removal from office has been ordered solely because he declined to waive his privilege against self-incrimination before he was ever questioned by the County Grand Jury. His removal was summary, without any hearing to determine whether his refusal to waive his Fifth Amendment privilege impaired his fitness to remain in public office. No hearing was had or ordered, either before an administrative body or before a court, in which petitioner could seek to demonstrate that his continued employment was consistent with the real interests of the State. Thus by directing the entry of a summary judgment in favor of the Attorney General, the Court of Appeals effectively and summarily directed that petitioner

be removed from public office and that he be disqualified from public employment for the next five years.

As to that result, the Court of Appeals could find "no such inescapable conflict with the Fifth Amendment as to destroy the salutary mandate which the People of New York have written into their Constitution."

## REASONS FOR GRANTING THE WRIT

### 1. The decision below directly conflicts with the due process principles enunciated in this Court's Slochower ruling.

In *Slochower v. Board of Education*, 350 U.S. 551, this Court held that the due process requirements of the Fourteenth Amendment precluded the summary dismissal of a state college professor solely because he had asserted his privilege against self-incrimination at a congressional committee hearing. In so doing, the Court took pains to point out that "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry will show Slochower's continued employment to be inconsistent with a real interest of the State." 350 U.S. at 559.

Thus *Slochower* established that the indispensable predicate to any attempt to discharge a public employee in the Fifth Amendment context is a "proper inquiry." And that "proper inquiry" must be directed at something more than whether the employee did or did not invoke his privilege against self-incrimination. The "proper inquiry" must also concern itself with whether, in light of an invocation of the privilege, the employee's continued employment is consistent with the "real interest of the State." To discharge him solely and summarily by imputing unfitness because he asserted the privilege, without holding such a "proper inquiry," is to permit "the heavy hand" of the New York constitutional provision to fall on a public employee for having freely exercised a constitutional privilege "the full enjoyment of which every person is entitled to receive."

350 U.S. at 558. See also *Malloy v. Hogan*, 378 U.S. 1; *Stevens v. Marks*, 383 U.S. 234; *Garrity v. New Jersey*, 385 U.S. 493; *Spevack v. Klein*, 385 U.S. 511.

The action of the New York Court of Appeals in this case cannot be squared with the *Slochower* requirement. By directing that a judgment be summarily entered, forfeiting the petitioner's present and future public employment privileges, that court has achieved precisely the summary result that was outlawed by *Slochower*. The summary judgment decreed by the court precluded any opportunity for a "proper inquiry"—either of an administrative or judicial nature—into the problem of whether the continued employment of the petitioner is inconsistent with any real interest of the State. No chance was afforded the petitioner to be confronted with or to cross-examine those who believe his continued employment might be inconsistent with the best interests of the State; nor did he have any chance to present his own evidence as to the appropriateness of his continued employment.

Certainly a person's mere refusal to waive his privilege against self-incrimination before entering a grand jury room, without more, tells nothing about his fitness for public office. Nor does it justify imputing unfitness for public office. His choice to remain silent may be dictated or motivated by any of a large number of reasons having no bearing on the performance of his public duties or his fitness for office. See *Slochower*, 350 U.S. at 558.

Significantly, the delegates to the New York State Constitutional Convention in 1967, having the advantage of this Court's rulings in *Slochower* and subsequent cases, voted to modify Art. I, Sec. 6, to provide that the mere invocation of the privilege against self-incrimination, or the refusal to sign a waiver, would not automatically result in the forfeiture of public employment. Under the proposed revision, following such an invocation or refusal,

> ". . . the appropriate authority, as prescribed by law, or the attorney general shall conduct a hearing

> into the fitness of such person to serve in public office or employment. If as a result of such hearing, it is determined that the person's refusal substantially impairs his fitness to serve in public office or employment then such person shall be disqualified from holding any public office or employment for five years from the date of such determination and shall be removed from his public office or employment, if any."

Unfortunately, this proposed amendment of Art. I, Sec. 6, like all other amendments, was not accepted by the voters of New York in the 1967 election. But the proposal itself reflects an acceptance and an understanding of the due process hearing requirements spawned by *Slochower*. Those requirements simply were not met in this case; nor will they ever be met in future situations of this nature if the decision below is allowed to stand.

In short, petitioner was summarily denied employment solely because he declined to sign a waiver of his Fifth Amendment privilege against self-incrimination. He was punished, by forfeiture of his employment, for having elected "to remain silent," as to which the Constitution guarantees that he shall "suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. at 8.

The fact that this summary punishment occurred through the operation of the summary judgment procedures of the New York judiciary does not make the constitutional problems any less obvious or important. See *Shelley v. Kraemer*, 334 U.S. 1. And the fact that petitioner had no occasion to raise this constitutional objection prior to the decision of the New York Court of Appeals, the lower courts all having entered judgments in petitioner's favor, does not deprive this Court of jurisdiction to consider and resolve the constitutional objection. The New York Court of Appeals plainly raised and passed on this constitutional question on its own motion, and "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436.

The continuing reluctance of the New York judiciary to accord public employees the right to remain silent in the unfettered exercise of their free will and to suffer no summary penalty therefor underscores the importance of the constitutional problem and the need for further elaboration of the guiding principles by this Court.[2]

**2. The decision below raises problems as to the validity of Art. I, Sec. 6, of the New York Constitution similar to those now pending before the Court.**

Presently pending before this Court for decision, following oral arguments, are three New York cases raising substantially similar problems as to the constitutional validity of Art. I, Sec. 6, of the New York Constitution (as well as the parallel provisions of § 1123 of the New York City Charter). *Gardner v. Broderick*, No. 638, Oct. Term 1967; *George Campbell Painting Corp. v. Reid*, No. 673, Oct. Term 1967; *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation*, No. 823, Oct. Term 1967.

The specific question here raised as to the validity of Art. I, Sec. 6, concerns its interpretation and application by the New York Court of Appeals so as to permit a summary discharge and forfeiture, without the semblance of an administrative or judicial hearing, for the sole reason that the public employee declined to sign a waiver of immunity. Such a reading and application of the New York constitutional provision would appear impermissible under this Court's *Slochower* ruling, as previously indicated.

None of the three pending cases raises a constitutional issue in terms of facts wholly identical to those here involved. The closest question raised would appear to be the one present in *Gardner*, No. 635, where the appellant was discharged

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[2] To borrow the words of Mr. Justice Harlan's dissent in *Garrity*, 385 U.S. at 509, in New York we are now "entitled to assume that discharges will be used either to vindicate impermissible inferences of guilt or to penalize privileged silence."

for refusal to sign a waiver of immunity *after an administrative hearing on the charge of refusal to sign that waiver.* Whether that hearing was adequate to meet the *Slochower* requirements must be determined by this Court. If the hearing is found to have been adequate, *Gardner* will not be dispositive of the instant case, where there was no hearing whatever. On the other hand, if the *Gardner* hearing is found inadequate, this case may well be controlled by the *Gardner* result.

It would therefore seem appropriate to withhold action on the instant petition until the three pending cases have been resolved by this Court and to assess the appropriateness of reviewing the constitutional ruling below in light of the decisions in those cases.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New York Court of Appeals.

Respectfully submitted,

HERALD PRICE FAHRINGER
One Niagara Square
Buffalo, New York 14202

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006

*Counsel for Petitioner*

May 6, 1968.

## APPENDIX A

STATE OF NEW YORK COURT OF APPEALS

No. 375.
State of New York and Louis J. Lefkowitz, as Attorney General of the State of New York,
Appellants,

vs.

Carl Perla, Sr.,
Respondent.

### OPINION

BERGAN, J.:

Defendant is the Commissioner of Street Sanitation of the City of Buffalo, to which position he was appointed in January, 1966. He was, before that, from January, 1954 to January, 1966, Acting Head Parking Fee Collector and Parking Fee Collector of that city.

The Grand Jury of Erie County in March, 1966 conducted an inquiry into defendant's conduct of the previously held parking fee collecting offices. He was subpoenaed before the Grand Jury; advised of the nature of the inquiry by the district attorney; offered a waiver of immunity covering his parking fee offices, and refused to sign it.

This action by the People and the Attorney General is to forfeit defendant's present office of Commissioner of Sanitation in pursuance of Article I, section 6, of the New York Constitution. That section provides "any public officer" who refuses to sign a waiver of immunity against subsequent criminal prosecution when called before a Grand Jury to testify concerning his present office or of "any public office

held by him" within five years "shall be removed from" his present office or shall forfeit it at the suit of the Attorney General.

Two constitutional questions arise. One under the New York Constitution, whether the parking fee collecting offices previously held by defendant until January, 1966 fall within the term "public office" as it appears in Article I, section 6; the other under the Fifth Amendment of the United States Constitution, whether the compulsion exerted by forfeiture of office is a violation of defendant's protection against self-incrimination (*Spevak v. Klein*, 385 U.S. 514).

The Court at Special Term and the Appellate Division have held the parking fee collecting offices held by defendant are not within the term "public office" appearing in Article I, section 6, and hence defendant will not forfeit his present place as Commissioner of Street Sanitation. It was unnecessary, in view of that conclusion, to reach the Federal constitutional question. Accordingly, the suit for forfeiture was dismissed and judgment was entered for defendant.

By reference to some constitutional and statutory usage of the term, it is possible to give narrow meaning to the expression "public officer" and thus to say that the provision requiring a waiver, as used in the Constitution, was intended to apply only to an elected official or to one in high administrative authority.

This literal effect would mean that a tax commissioner, for example, would lose his place if he refused to testify concerning his knowledge of a theft of money in his office; but the cashier under him could both refuse to testify about his knowledge of the theft within the area of his official duty, and also keep his job.

The debates in the Constitutional Convention of 1938 disclose a purpose to impose a highly responsive standard of responsibility on people who choose to work in the public service. It was a responsibility not graded off sharply to

differentiate between officers with administrative power and those without it. The essential purpose was to impose a duty to disclose knowledge of crimes in the public service or forfeit the public place.

The rank of office bears no meaningful relationship to the duty to disclose knowledge of wrongdoing in the public service. A court, construing this constitutional device designed to protect the integrity of the public service, ought not to say that if a clerk knows of wrongdoing he can cover it up with impunity; while his superior can, for the same thing, lose his office.

The constitutional policy, stated in its ultimate simplicity, is to require any man holding a place in public service, high or low, to choose between keeping his job and disclosing his knowledge of criminal wrongdoing in that place. The imposed choice seems reasonable and the reason behind it applies equally to officials of high and low degree.

The stress in the debates at the 1938 Convention on the proposal which gave birth to this provision was on elected officers. This was because of then recent experiences in the public service. But it becomes clear in reading the discussion (*Record*, 1938 Constitutional Convention, e.g., pp. 2570-2590) that the provision was aimed at any public official having knowledge of wrongdoing in his office.

Justice Halpern, who proposed the amendment in its original form using the term "public officers" (*Record*, p. 2570), explained it as relating to the misconduct of public "officials", which is less technical in its statutory usage and hence a broader expression than "public officers" (p. 2571), and Senator Feinberg in debate made a similar reference of equivalency between "public officer" and "public official" (p. 2577).

Justice Eder equated the kind of official with which the Convention was concerned with "any office holder of the City of New York" (p. 2591). This, it is true, was an illustrative reference to a statute authorizing inquiries by a city

investigator, but it tends to demonstrate that the rank of official the Convention had in mind was not solely the elected or high ranking functionary.

Justice Martin, whose amendment to limit the operative inquiry to that made by a grand jury, although he referred sometimes to "public officers" also, repeatedly used the term "Public official" (see, e.g., *Record*, pp. 2592, 2597, 2599).

Mr. Fertig stated that there was "no justification for any public official's declining to testify" concerning his "official work" (*Record*, p. 2594). It becomes clear in reading the discussion that this was the general sense of the Convention and the delegates were not distinguishing between high-ranking administrative public officials and those in lower grades of public service.

The Convention was framing a constitutional provision to require anyone in the public service to testify in a proper inquiry concerning his own area of official responsibility or, on refusal, to risk his official place. A constitutional provision, thus broadly designed, would not be fully operative if it held one man personally highly accountable for his official duties and another man not accountable because he held a different or lower title.

Nor is the use of the term "public officer" in the Constitution necessarily identical with its use in the Public Officers Law. That statute, concerned largely with appointments, vacancies, qualifications and powers, has definitions for its own technical purposes as to public officers (see, e.g., § 2). But the constitutional provision uses the term "public officers" in quite a different context and in much broader scope than the definitive provisions of the statute.

The relevant text of the constitutional provision, as it was proposed by the 1938 Convention and approved that year, was that the officer refusing to waive immunity or testify under the prescribed conditions "shall be removed from office" by the appropriate authority or "shall forfeit

his office" at the suit of the Attorney General (*Record*, p. 3360).

It soon became apparent that this removal or forfeiture was no bar to reappointment to another office. (Cf. *People v. Harris*, 294 N.Y. 424 [1945].) To foreclose this possibility an amendment was approved in 1949 which, before the words "shall be removed", inserted the clause "shall, by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years".

It is argued that the use of "any public officer" in describing who is affected by the failure to waive immunity, and the use in the 1949 amendment of "any other public office or public employment" in dealing with the consequences, suggest an intentional purpose by the constitutional draftsmen to distinguish between the initial office held and forfeited and the kinds of offices to which the five-year disability would attach.

From this it is suggested that the language, as amended in 1949 shows an intent to provide that a commissioner thus removed could not be appointed to another commissioner's job or to a commissioner's clerk's job within five years; but a commissioner's clerk could not be removed and would continue to be eligible for appointment either as a commissioner or a clerk.

This is hard rationalization. No such suggestion appeared in any of the debates or public discussion following *Harris* and which led to the five-year limit on availability for appointment of a removed official. Indeed, in *Harris* the Commissioner of Water and Water Supply who refused to waive immunity was appointed to a newly created office of Superintendent of Water Rent Delinquencies (426, 428) and one of the critical issues in the case, in construing Article I, section 6, as amended in 1938, was that there was "no provision that a public officer who refuses to sign a waiver of immunity shall not be eligible for election or appointment to any other office" (Thacher, J., p. 427). Thus, the

"only consequence" was removal from that office (p. 427). It was this omission only that led to the amendment of 1949 and a wider or different consequence ought not be attributed to it.

The contemporary view of the 1949 amendment is indicated in a memorandum by the Grand Jury Association of New York County to the Legislature in support of the bill providing for the change (New York State Legislative Annual, 1949, p. 46). It noted that the debates of the 1938 Convention showed an intention "that a public official refusing to testify before a grand jury * * * under a waiver of immunity should be removed from office", but that *People v. Harris* "has disclosed a loophole" which it was suggested be corrected "to prevent avoidance of the clear intent" of the 1938 amendment.

An additional omission in the original provision was uncovered in 1956 by *People v. Doyle* (286 App. Div. 276; affd. 1 N Y 2d 732) which held that a refusal to waive immunity or testify concerning a previous office would not result in removal from a different present office.

The Attorney General's memorandum to the Legislature on a proposal to change this, resulting in the adoption of a further amendment in 1959, covered also the history of the 1949 amendment (N. Y. State Legis. Annual, 1959, 148-150).

The memorandum noted "that the expressed views of the Legislature and the People [by the 1938 and 1949 amendments] as to what they demand of public officials by way of frank disclosure of their conduct" was now "frustrated to a great extent" by the holding of *Doyle* that the provision was limited to a present office.

Reasonably construed to give sensible effect to its policy purpose, the present language of the provision ought to embrace the offices of Parking Fee Collector and Acting Parking Fee Collector of the City of Buffalo, whose offices were the subject of investigation by the Erie County Grand Jury.

In January, 1967 the Supreme Court decided both *Spevak v. Klein* (385 U.S. 511, supra) and *Garrity v. New Jersey* (385 U.S. 493). In *Spevak*, a lawyer refused to produce demanded financial records or to testify at a judicial inquiry directed by the Appellate Division into his professional conduct, asserting his Federal Constitutional privilege against self-incrimination. The decision of this court affirming the consequent order of disbarment (16 N Y 2d 1048) was reversed by the Supreme Court.

But although the constitutional protection was extended to lawyers in respect of their private practice, the court expressly declined to reach the situation of the public official claiming a similar privilege under the Fifth Amendment. There seems some intimation from what the Justices wrote that they would, indeed, in such a situation reach a different result.

In *Garrity*, decided the same day, it was held that policemen who made confession of a crime when confronted with a choice either of incriminating themselves or losing their jobs were entitled to reversal of conviction because the confessions were not voluntary and in this respect the Fourteenth Amendment protected them.

In the opinion by Mr. Justice Douglas in *Spevak*, it was noted in discussing the possible *Garrity* situation (p. 516, fn. 3): "Whether a policeman, who invokes the privilege when his conduct as a police officer is questioned in disciplinary proceedings, may be discharged for refusing to testify is a question we did not reach."

Moreover, Justice Fortas, who constituted one of the necessary five Justices to reach the *Spevak* result (there were four voting for the opinion of Justice Douglas), expressly distinguished the situation "between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly, and narrowly relating to the performance of his official duties" (519).

A public official has the undoubted right to claim a constitutional privilege against self-incrimination; but the State

has a concomitant right to discharge him from his job if his refusal to testify relates to his public employment.

There is no such inescapable conflict with the Fifth Amendment as to destroy the salutary mandate which the People of New York have written into their Constitution.

The order should be reversed and the motion of plaintiffs for summary judgment granted without costs.

* * * * * * *

Order reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion herein. Opinion by Bergan, J. All concur.

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## ORDER ON REMITTITUR FROM COURT OF APPEALS AND JUDGMENT

At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie at the Erie County Court House, Buffalo, New York, on the 23rd day of April, 1968.

PRESENT:

Hon. Gilbert H. King, J.S.C.
Justice

(Same title).

The plaintiffs above named having appealed to the Court of Appeals from the Order of the Appellate Division, Fourth Department, entered June 15, 1967, which affirmed an Order of the Supreme Court, Erie County, granted August 21, 1966, which denied plaintiffs' motion for summary judgment and which granted defendant's motion for summary judgment dismissing plaintiffs' complaint,

And said appeal having been duly argued in the Court of Appeals, and after due deliberation the Court of Appeals

having ordered and adjudged that the said Order of the Appellate Division be reversed, without costs, and the matter remitted to Special Term for further proceedings in accordance with the opinion rendered by the Court of Appeals on April 17, 1968, copy of said opinion and the original remittitur being annexed hereto,

NOW, on motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the plaintiffs, it is

ORDERED that the said Order of the Court of Appeals is made the Order of this Court and that defendant's motion for summary judgment dismissing the complaint is hereby denied and that the plaintiffs' motion for summary judgment is hereby granted, and it is hereby

ORDERED, ADJUDGED AND DECREED that by reason of the refusal of the defendant, CARL PERLA, SR., to sign a waiver of Immunity, as required by Article I, Section 6, of the State Constitution, he has forfeited and vacated his office as a Commissioner of Street Sanitation of City of Buffalo, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant, CARL PERLA, SR., is hereby disqualified from holding any other public office or public employment for a period of five years from the date of his refusal to sign a Waiver of Immunity.

ENTER,

/s/ Gilbert H. King
Justice of the Supreme Court

*Judgment Signed this 23 day of April 1968*

* * * CLERK

## APPENDIX B

### DECISION OF SUPREME COURT OF NEW YORK, ERIE COUNTY

(Same Title.)

Louis J. Lefkowitz, Esq., Attorney General, State of New York (Julius L. Sackman, Esq., of Counsel) for Plaintiffs,

Lipsitz, Green, Fahringer, Roll, Schuller & James (Herald P. Fahringer, Esq., of Counsel) for Defendant.

O'DONNELL, J.

This is an action by the State of New York and the Attorney General against Carl Perla Sr., requesting a judgment that he forfeit his office as Commissioner of Street Sanitation of the City of Buffalo, and that he be disqualified from holding any other job, office or public employment for a period of five (5) years.

The facts here are not in dispute. It appears that the defendant, Perla, was appointed by the City of Buffalo on April 19, 1954 as Parking Fee Collector and on January 16, 1961 he was given a provisional appointment as Acting Head Parking Fee Collector, in which job he remained until he assumed his present position of Commissioner of Street Sanitation on January 1, 1966. He was called before the Grand Jury of Erie County in March of 1966. (This is the February Grand Jury whose term has been extended by the County Court.) He was advised that the Grand Jury was investigating matters concerning Mr. Perla's conduct as Parking Fee Collector and Acting Head Parking Fee Collector, and he was asked to sign a waiver in the usual form. This he declined to do and offered to sign a waiver limited to his conduct as Street Sanitation Commissioner, which offer was refused by the Grand Jury.

It further appears that the defendant at this time is on a leave of absence from his position as Commissioner of Street Sanitation.

The only question that seems to be in dispute in this matter is whether or not the defendant in his work as a Parking Fee Collector was a public officer within the meaning of the State Constitution.

The applicable provision of the Constitution is found in Article I, Section 6 as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime (except in case of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other

> public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office at the suit of the attorney-general."

This provision was inserted in the Constitution after the Convention of 1938, and both parties have relied at great length upon the proceedings of that convention as to whether or not it was the intention of the convention to differentiate between public officers and public employees.

It appears to this court the amendment was a result of the failure of publicly elected officials to testify in the Seabury investigation, and to insist on their constitutional right to plead the 5th Amendment. However, the court feels that it was not the intention of the delegates that this should include the public employee who is not in a position of authority, and in this connection it might be well to note that the original provision was amended in 1949, and there was added thereto,

> "* * * shall by virtue of such refusal be disqualified from holding any other public office or public employment for a period of five (5) years."

It seems to the court that this was added as an additional penalty, as previously the party refusing to testify only lost his office and could have been employed thereafter immediately in public employment, and that the Legislature in submitting this amendment to the people felt that the previous penalty was not sufficient.

There have been many decisions as to what constitutes a public officer, and of course the Attorney General on November 23, 1962 with respect to a senior investigator for the State Liquor Authority, gave his opinion that he was a public officer within the meaning of the Constitution.

However, the courts have in many instances spoken on this matter. (People v. Pinckney, 32 N. Y. 377; Matter of Gelson v. Berry, 233 A. D. 20; Devlin v. City of New York, 149 N. Y. S. 1061; Matter of Conolly v. Craft, 205 A. D. 583; People *ex rel.* Fuller v. Color, 33 A. D. 617; Matter of Sweeney v. Donovan, 1 Misc. 2d 125; Canteline v. McLellan, 171 Misc. 327, rev'd. on other grounds 258 A. D. 314 and aff'd. 282 N. Y. 166.)

There have been findings in other jurisdictions and both sides have made them available to the court. The Attorney General cited Christal v. Police Commissioner of the City and County of San Francisco, 33 Cal. App. 2d 564, 92 P. 2d 416. The defendant relies on a case that was determined in the State of Florida that is almost on all fours with the instance here, involving a Parking Fee Collector there (State *ex rel.* Dresskell v. City of Miami, *et al.*, 13 So. 2d 707) where the Supreme Court of Florida held that a Parking Meter Collector and Repairman in the Department of Public Safety of the City of Miami was not a public officer.

The court feels that we should look at the announcements of the Civil Service Commission of the City of Buffalo in announcing examination for Parking Fee Collectors in which it is stated that the duties of the job were, "collect, seal coin boxes from parking meters and replace them with empty sealed boxes; check seals for evidence of tampering and report accordingly; check meters as to operating condition and report accordingly; wind clock mechanism in meters."

And as to the position of Head Parking Fee Collector, the Commission's announcement stated:

> "A position of this class involves work of a routine supervisory nature in seeing that all parking meters in the city are opened and checked once each week and that reports on the condition of meters are made

each day. Supervision is received from the Supervising Parking Fee Collector and is exercised over the Parking Fee Collectors."

Among the papers submitted on this motion are affidavits of Angelo Gallo and James McKowne, Parking Fee Collectors of the City of Buffalo, in which they recite that they worked with the defendant when he received his provisional promotion as an Acting Parking Fee Collector. The affiants state that the defendant in that capacity had no authority over the other Parking Fee Collectors and did exactly the same work, in the same way, as the other Parking Fee Collectors.

There is also of course, the defendant's affidavit in which he states that he had no authority and that he took his orders from the Treasurer's Office of the City of Buffalo and that he had no other authority.

It might be interesting to note the Supreme Court of the United States in a recent opinion, February 21, 1966, Rosenblatt v. Baer, 86 Sup. Ct. 669. Justice Brennan writing for the majority of the court stated:

"It is clear therefore that the public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."

This court holds that as presently in effect, Article 1, Section 6 of the Constitution is constitutional.

The court further holds, that in the position of Parking Fee Collector and Acting Head Parking Fee Collector the defendant was not a public officer within the meaning of the Constitution and wholly within his rights in refusing to waive his rights under the 5th Amendment of the Federal Constitution.

Therefore, the motion of the plaintiff for summary judgment is denied and the defendant's motion for summary judgment dismissing the plaintiff's complaint is granted.

Submit order.

Dated: Buffalo, New York, August 19th, 1966.

THOMAS J. O'DONNELL,
*Justice of the Supreme Court.*